

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
MICHIGAN CENTER SCHOOL DISTRICT)	File No. BPLIF-920717DA
)	
CONCORD COMMUNITY SCHOOLS)	File No. BPLIF-920717DB
)	
Waiver Request and Petition for Reconsideration of Dismissal of Applications for ITFS Stations)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 21, 2010

Released: April 23, 2010

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we dismiss as late-filed a petition for reconsideration. Petitioners request that the Commission reconsider its dismissal of certain mutually exclusive applications and grant a waiver of our rules regarding deadlines for filing petitions for reconsideration. Though the petition was filed more than three years after the filing period, the petitioners have not shown the requisite extraordinary circumstances to waive the statutorily imposed deadline.

II. BACKGROUND

2. The reconsideration petition before us concerns dismissal of mutually exclusive Instructional Television Fixed Station (ITFS) applications. On April 2, 1992, Hillsdale Community Schools and Jonesville Community Schools (the Hillsdale Applicants) filed applications for new ITFS stations at Albion, Michigan.¹ Petitioners Michigan Center School District (MCSD) and Concord Community Schools (CCS) state that on or about June 17, 1992, they each entered into an ITFS excess capacity airborne lease agreement with Wireless Cable, Inc. (WCI).² On July 17, 1992, Petitioners filed applications for new ITFS stations at Jackson, Michigan that were mutually exclusive with the Hillsdale Applications.³ According to Petitioners, on or about September 12, 2001, they entered into amended and restated ITFS excess capacity lease agreements with American Telecasting of Jackson, Inc., a wholly-owned subsidiary of Sprint Corporation, noting that sometime between June 17, 1992 and September 12, 2001, the 1992

¹ See Application of Hillsdale Community Schools New Instructional Television Fixed Service Station, File No. BPIF-19920402DL (filed Apr. 4, 1992); Application of Jonesville Community Schools for New Instructional Television Fixed Service Station, File No. BPIF-19920402DM (filed Apr. 4, 1992) (Hillsdale Applications).

² Waiver Request and Petition for Reconsideration of Dismissal of Applications for ITFS Stations (filed Aug. 20, 2009) (Petition) at 3.

³ Application of Michigan Center School District for New Instructional Television Fixed Service Station, File No. 19920717DA (filed July 17, 1992); Application of Concord Community Schools for New Instructional Television Fixed Service Station, File No. 19920717DB (filed July 17, 1992) (Applications).

excess capacity lease agreements with WCI had been assigned by WCI to American Telecasting of Santa Barbara, Inc., and in turn assigned to Sprint.⁴

3. On July 29, 2004, the Commission released the *BRS/EBS R&O* that transformed the rules and policies governing the licensing of services in the 2500-2690 MHz band.⁵ As part of that transformation, the Commission renamed ITFS the Educational Broadband Service (EBS), and dismissed mutually exclusive applications for ITFS stations where the mutual exclusivity had not been resolved prior to the release of the Notice of Proposed Rulemaking in the proceeding.⁶ Notification of the dismissal was sent to MCSD and CCS at the addresses listed on their applications.⁷

4. Eleven applicants, including Petitioners, requested reconsideration of the decision to dismiss mutually exclusive ITFS applications.⁸ On April 27, 2006, the Commission denied all but one of those petitions.⁹ In response to an argument made by Petitioners, the Commission noted: “We also reject arguments from applicants who argue that their applications should not have been mutually exclusive because the application they were mutually exclusive with was defective. The pertinent consideration is that, as of the date of the *NPRM*, a mutually exclusive application was pending.”¹⁰ A copy of the *BRS/EBS 3rd MO&O* was mailed to the attorney who filed the petition for reconsideration on behalf of the Petitioners.

5. Petitioners now contend that although Sprint continued to make monthly lease payments to Petitioners, Sprint did not notify petitioners until December 11, 2007, of any action by the Commission affecting the status of petitioners’ applications. On December 18, 2008, Clearwire Xolm, LLC (Clearwire) notified Petitioners that Sprint and Clearwire had merged their WiMAX technology operations and that their lessees were now subsidiaries of Clearwire.¹¹ On May 1, 2009, Clearwire terminated the leases with Petitioners because Petitioners’ petitions for reconsideration of the *BRS/EBS R&O* were denied in April

⁴ *Id.* at 4-5.

⁵ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O* and *FNPRM* as appropriate).

⁶ *BRS/EBS R&O*, 19 FCC Rcd at 14264-14265 ¶ 263.

⁷ See Dismissal Letters, Ref. Nos. 2971851, 2971872 (Aug. 12, 2004) (Dismissal Letters).

⁸ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O* and *FNPRM* as appropriate), *recon. denied in pertinent part, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5795 Appendix D (2006) (*BRS/EBS 3rd MO&O*).

⁹ *Id.* at 5703-5704 ¶¶ 236-239. The Commission granted a petition filed by Shekinah Network because Shekinah demonstrated that its application had been subject to a settlement agreement that had been filed and approved prior to release of the *NPRM*. *Id.* at 5704 ¶ 239.

¹⁰ *Id.* at 5704 ¶ 238.

¹¹ Petition at 8.

2006.¹² Clearwire terminated monthly rental payments pursuant to those leases.¹³ Petitioners claim they never received any formal notification of action taken on their petitions for reconsideration.¹⁴

6. The instant Petition was filed on August 20, 2009.¹⁵ Petitioners argue that their Applications should not have been dismissed because the Hillsdale Applications had been abandoned and should have been dismissed.¹⁶ Petitioners allege that while they responded to an October 2002 request¹⁷ from the Commission's Wireless Telecommunications Bureau that all MDS and ITFS license applicants review their current information in the Broadband Licensing System database, verify its accuracy, and request continued processing of any pending applications, they found no evidence that the Hillsdale Applicants ever did so.¹⁸ If the Hillsdale Applications had been dismissed, Petitioners argue, their own Applications would no longer have been mutually exclusive with any other applications.¹⁹ Petitioners argue that they have demonstrated unique facts and circumstances to warrant waiver of Sections 1.103 and 1.106 of the Commission's Rules,²⁰ which establish the effective date of Commission actions and the deadline for filing petitions for reconsideration, particularly the lack of status notifications to Petitioners.²¹

III. DISCUSSION

7. Pursuant to Section 1.925 of the Commission's Rules, a waiver is proper if it is shown that either: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²² In this case, we conclude that it is not appropriate to grant a waiver of Section 1.103 and 1.106 of the rules.

8. The Applications were dismissed on July 29, 2004.²³ This action was confirmed by the Commission on reconsideration on April 27, 2006.²⁴ Section 405(a) of the Communications Act of 1934, as amended,²⁵ as implemented by Section 1.106(f) of the Commission's Rules,²⁶ requires that a petition for

¹² *Id.* at 8.

¹³ *Id.*

¹⁴ *Id.* at 9.

¹⁵ *Id.*

¹⁶ *Id.* at 9.

¹⁷ Wireless Telecommunications Bureau Seeks To Verify ITFS, MDS, and MMDS License Status and Pending Applications, *Public Notice*, 17 FCC Rcd 20543 (WTB 2002). *See also* Wireless Telecommunications Bureau Seeks to Clarify Public Notice Relating to Verification of ITFS, MDS, and MMDS License Status and Pending Applications, *Public Notice*, 17 FCC Rcd 24623 (WTB 2002).

¹⁸ Petition at 10.

¹⁹ *Id.* at 11.

²⁰ 47 C.F.R. §§ 1.103, 1.106.

²¹ Petition at 2.

²² 47 C.F.R. § 1.925(b)(3).

²³ *BRS/EBS R&O*.

²⁴ *BRS/EBS 3rd MO&O*.

²⁵ 47 U.S.C. § 405(a).

²⁶ 47 C.F.R. § 1.106(f).

reconsideration be filed within thirty days from the date of public notice of Commission action.²⁷ Computation of the thirty-day period is determined in accordance with Section 1.4 of the Commission's Rules.²⁸ Accepting the April 27, 2006 date as the commencement of the thirty-day period for filing, a petition for reconsideration was due by May 30, 2006.²⁹ The Petition was filed on August 20, 2009, more than three years after the deadline.

9. The Commission has consistently held that it is without authority to extend or waive the statutory thirty-day filing period for filing petitions for reconsideration specified in Section 405(a) of the Communications Act,³⁰ except where "extraordinary circumstances indicate that justice would thus be served."³¹ We do not believe that petitioners have shown such extraordinary circumstances to be present here. Petitioners rely primarily upon their lack of attorneys, engineers, or appropriate experts on staff experienced in ITFS station or Commission matters, as well as their lack of familiarity with such matters. We find these arguments unavailing. An applicant is responsible for the prosecution of its application, and "the applicant is ultimately responsible if counsel does not vigorously prosecute the applicant's interests."³² In this case, by relying on its lessees and their counsel, Petitioners assumed the risk that action might not be taken in a timely manner.³³ Furthermore, contrary to Petitioners' arguments, they were personally notified of the 2004 dismissal of their Applications,³⁴ and the Commission properly served the *BRS/EBS 3rd MO&O* on counsel who filed the petition for reconsideration on behalf of Petitioners.³⁵ We do not find that these circumstances, attributable to Petitioners' own choices, constitute extraordinary circumstances that would authorize us to waive the statutory requirements.

10. Furthermore, even if there was precedent for excusing Petitioners' failure to learn of the *BRS/EBS 3rd MO&O* earlier, the Petition is untimely as measured from May 2009, when Petitioners admit they learned that their petition for reconsideration was denied in 2006. The Petition was not filed until August 20, 2009³⁶ over three months after Petitioners themselves admit notice. Petitioners have not explained their failure to act in a timely manner once they learned of the 2006 denial of the petition for reconsideration. We conclude that Petitioners have not acted diligently and that it would be improper, both legally and as a matter of policy, to waive the statutory deadline for filing petitions for reconsideration in this instance.

²⁷ 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f).

²⁸ 47 C.F.R. § 1.4. *See also* 47 C.F.R. § 1.103.

²⁹ Thirty days after April 27, 2006 was May 27, 2006, a Saturday. Monday, May 29, 2006, was Memorial Day. Tuesday, May 30, 2006 was the first non-holiday date thirty days after April 27, 2006. *See* 47 C.F.R. § 1.4.

³⁰ *See Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).

³¹ *Gardner v. FCC*, 530 F.2d at 1091.

³² *See Royce International Broadcasting Company, Memorandum Opinion and Order*, 23 FCC Rcd 9010, 9014 ¶ 13 (2008); *Hillebrand Broadcasting, Inc., Order*, 1 FCC Rcd 419, 420 n.6 (1986).

³³ We offer no opinion on any issues concerning potential liability between Petitioners, Sprint, and counsel who prepared the petition for reconsideration of the *BRS/EBS R&O* in the name of Petitioners.

³⁴ *See* Dismissal Letters.

³⁵ *See* 47 C.F.R. § 1.12 ("In any matter pending before the Commission in which an attorney has appeared for, submitted a document on behalf of or been otherwise designated by a person, any notice or other written communication pertaining to that matter issued by the Commission and which is required or permitted to be furnished to the person will be communicated to the attorney, or to one of such attorneys if more than one is designated.")

³⁶ *See* Petition.

11. Because the Petition is being dismissed as untimely, we need not consider Petitioners' substantive arguments. We note that, to the extent Petitioners rely on arguments that the mutual exclusivity between themselves and the Hillsdale Applications could have been resolved if they had been informed of pending matters, we found in the *BRS/EBS 3rd MO&O* that the pertinent consideration was whether a mutually exclusive application was pending as of the date of the *BRS/EBS NPRM*.³⁷ It is undisputed that the Hillsdale Applications were pending in April 2003 when the *BRS/EBS NPRM* was released.

IV. CONCLUSION AND ORDERING CLAUSE

12. For the reasons discussed above, we conclude that Petitioners have not demonstrated that grant of the requested waiver would be consistent with our statutory authority or in the public interest. Accordingly, the Petition must be dismissed as late filed.

13. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the request for waiver and petition for reconsideration filed by Michigan Center School District and Concord Community Schools on August 20, 2009 IS DENIED with respect to the request for waiver and IS DISMISSED with respect to the petition for reconsideration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁷ *BRS/EBS Third MO&O*, 21 FCC Rcd at 5704. Even were we to treat the declaration of Richard Ames as pertinent at this late date, we note that this only speaks to the Hillsdale Community Schools, and not to the Jonesville Community Schools.